(33)

FILED
JUL 21 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 186

ALLEN J. PATCH,
Petitioner,

vs.

PERRY G. STAHLY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

A. TREVOR JONES,
LLOYD W. PATCH,
Attorneys for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

INDEX.

	PAGE
Petition for Certiorari	1
Brief Statement of the Case	2-5
Jurisdiction of this Petition	5
Questions Presented	5-6
Reasons Relied Upon	7
Conclusion	12

AUTHORITIES CITED.

Erie Railroad Co. v. Tompkins, 304 U. S. 64	6, 8, 11
LeRoy J. Leishman v. Associated Wholesale, 318 U. S. 203	5
McClaren, et al. v. Dawes, 86 Ind. App. 196; 156 N. E. 584	4, 10
Mt. Pleasant Coal Co. v. Watts, 91 Ind. App. 501; 151 N. E. 7	4, 10
Pecheur Lozenge Co. v. National Candy Co., 315 U. S. 666	5
Taylor v. Mayo, 110 U. S. 330	9, 10
Rule 38 of Supreme Court of United States, Par. 5, Sec. (b)	5
U. S. Code, Title 28, Sec. 212	7
U. S. Code, Title 28, Sec. 213	7
U. S. Code, Title 28, Sec. 225	7
U. S. Code, Title 28, Secs. 347, 350	5
17 Corpus Juris Secundum, p. 715	4, 8
17 Corpus Juris Secundum, p. 735	4, 9

In The

Supreme Court of the United States

October Term, A. D. 1943.

No.

ALLEN J. PATCH,
Petitioner,

vs.

PERRY G. STAHLY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Allen J. Patch, a citizen of the State of Wisconsin, petitions for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled suit against Perry G. Stahly, a citizen of the State of Indiana.

BRIEF STATEMENT OF THE CASE.

Jurisdiction below is founded upon diversity of citizenship and the requisite amount in controversy. The law of Indiana is controlling.

The suit is on a contract (Rec. 5) in writing and under seal between petitioner and respondent, which petitioner signed as "Engineer" and respondent signed as "Trustee", at South Bend, Indiana, on April 20, 1937, calling for certain services to be rendered by Engineer to "Trustee and his successors and assigns", Trustee in return agreeing to employ Engineer until July 31, 1938, and to pay Engineer "so long as Engineer remains in the employ of Trustee and/or his successors and assigns" a certain specified salary, of which $3883.29 is admittedly unpaid (Rec. 73), although full performance by petitioner is conceded (Rec. 68).

Respondent contended that he was not personally liable on the contract, and the Court of Appeals sustained this defense, on three grounds, as follows:

(a) That there was a prior contract between the parties in which the trustee was by its express terms relieved of personal obligation under certain contingencies (Rec. 22), and in spite of the fact that the contract in suit expressly states that it supersedes and annuls all previous contracts and understandings between the parties either individually or otherwise and embodies the full and complete understanding and agreement of the parties not to be amended or changed except in writing and signed by the parties (Rec. 9). The parties are stated to be Perry G. Stahly and Allen J. Patch (Rec. 10).

(b) That respondent signed as "Trustee", and in spite of the fact that neither the contract in suit (Rec. 5) nor

the trust agreement (Rec. 13) exempts the trustee from liability and that the contract states that "Trustee employs Engineer * * * and for his services agrees to pay Engineer * * * so long as Engineer remains in the employ of Trustee and/or his successors and assigns" (Rec. 6).

(c) That respondent formed a corporation for the manufacture of washing machines (Rec. 97), and that the contract in suit contains the statement: "As soon as said corporation is formed, this agreement shall automatically become the contract of said corporation" (Rec. 6), and in spite of the fact that the corporation was not in existence when the contract in suit was entered into and there was no contract then or later between the corporation and petitioner, although petitioner performed services for the corporation pursuant to the contract with respondent (Rec. 51).

The Court of Appeals held that the corporation was solely liable on the contract (Rec. 121), although not a party to the contract and not before the court.

The Court of Appeals made a finding without any reference to the record to support it that "The conduct of the parties subsequent thereto strongly indicates that the parties recognized the corporation as solely liable for performance of the contract" (Rec. 121), although the District Court made no finding to that effect and there is no scintilla of evidence in support thereof. No evidence that the parties considered the corporation additionally liable would support the finding. The Court of Appeals rejected the uncontradicted testimony that the respondent was to be personally liable on the contract in suit in consideration of the cancellation of the prior contract (Rec. 42, 62), and ignored the fact of payments by respondent personally on account of the contract in suit after the formation of the corporation (Rec. 54, 71).

At the hearing before the Court of Appeals, the three judges who heard this case were sitting in one room of the court building and two other circuit judges and a district judge were sitting in another room of the Court of Appeals building, hearing another case. On the bench hearing the present case was a judge from the State of Indiana, of which respondent is a citizen, but no judge from the State of Wisconsin, of which petitioner is a citizen. Had the court not been split as indicated, a judge from the State of Wisconsin might have been sitting on the hearing of the present case.

Petitioner's attorney was not aware of the fact that the Court of Appeals was sitting at two different places at the same time until after the hearing of this appeal.

Petitioner's brief and argument pointed out to the Circuit Court of Appeals that the law of this case is controlled by 17 *C. J. S.* pp. 715, 735, to the effect that a later superseding contract cannot have read into it to defeat it language of a prior cancelled contract, by *McClaren* v. *Dawes,* 86 Ind. App. 196, holding that Indiana does not recognize the existence of a trust as relieving a signatory to a contract, and by *Mt. Pleasant Coal Co.* v. *Watts,* 91 Ind. App. 501, to the effect that a promoter of a corporation is personally liable on his contract made for the benefit of a projected corporation. The Circuit Court of Appeals brushed aside this controlling law by stating merely: "We think there is no occasion to analyze and distinguish the authorities relied upon by plaintiff. None of them relate to a factual situation such as here disclosed" (Rec. 121).

The decision of the Circuit Court of Appeals referred to is reported at 135 F. (2d) 269, and is also found at Record page 118.

A petition for rehearing (Rec. 123) raising the questions here presented and also asking for modification of the judgment to decree the defendant (respondent here) liable at least for unpaid salary amounting to $2800 accrued prior to the formation of the corporation, was denied by the Court of Appeals without opinion (Rec. 163), thus further failing to give petitioner a proper hearing.

JURISDICTION OF THIS PETITION.

This application is made under 28 U. S. Code 347, 350 and Rule 38 of the Supreme Court of the United States, Paragraph 5, Sec. (b).

The judgment of which review is here sought was rendered April 30, 1943 (Rec. 118) and petition for rehearing and modification of the judgment was denied May 26, 1943 (Rec. 163).

Among cases believed to sustain the jurisdiction of this Court to issue the writ here prayed for are *Pecheur Lozenge Co.* v. *National Candy Co.*, 315 U. S. 666; and *Leroy J. Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203.

QUESTIONS PRESENTED.

The questions presented are all questions of law, as follows:

(1) Whether the Circuit Court of Appeals may sit in two places at the same time.

(2) Whether the Circuit Court of Appeals may make a finding not made by the trial court and without any reference to the record to support it.

(3) Whether the Circuit Court of Appeals is correct in holding that a written contract under seal may have read into it language of a prior contract between the same parties expressly cancelled by the later contract and so as to nullify the later contract.

(4) Whether the Circuit Court of Appeals is correct in holding that a person who signs a contract under his seal and the designation of trustee is not personally liable thereon, although neither the contract nor the trust instrument exempts him.

(5) Whether the Circuit Court of Appeals is correct in holding that a party to a written contract, signed by and under the seal of the party, is relieved from liability thereon by a statement in the contract, "As soon as said corporation is formed, this agreement shall automatically become the contract of said corporation".

(6) Whether the Circuit Court of Appeals has fairly dealt with the questions of law here involved and particularly whether the rule of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, has been complied with by the Circuit Court of Appeals.

These are all important questions of law which have not been but should be settled by this Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals, in a matter of procedure on this hearing, in the court being split and sitting in two places at the same time so as to deprive the petitioner of having a judge from the State of Wisconsin sit in this case, and in making a finding not made by the District Court and without any reference to the record to support it, has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

U. S. Code, Title 28, Sec. 212 (Judicial Code, Sec. 117), provides *inter alia,* that:

> "There shall be in each circuit a circuit court of appeals * * *",

which manifestly implies a single court and not several. And Title 28 U. S. C., Sec. 213 (Judicial Code, Sec. 118) says:

> "* * * and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law * * *",

which plainly refers to "*the* circuit court of appeals" and not to a plurality of circuit courts of appeals in a given circuit. And Title 28 U. S. C. 225 (Judicial Code, Sec. 128) states that:

> "The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions * * *",

again referring to a single court of appeals in each circuit and not to as many courts of appeals in a circuit as the number of circuit judges therein can be divided up into.

Furthermore, it is not the proper exercise of appellate jurisdiction under this statute when the Circuit Court of Appeals makes a finding not made by the District Court and without any reference to the record to support it.

Whether the views and practices of the United States Circuit Court of Appeals for the Seventh Circuit in these procedural matters are according to law are important public questions which have not been but should be passed upon by this Court.

The Circuit Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court, namely *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. The Court of Appeals has evaded the rule of this decision by merely stating, "We think there is no occasion to analyze and distinguish the authorities relied upon by plaintiff. None of them relate to a factual situation such as here disclosed." Whether this may properly be done and the rule of *Erie* v. *Tompkins* thus be brushed aside, has not been but should be settled by this Court.

The Circuit Court of Appeals has decided an important question of general and local law in conflict with the accepted and universal rule in the construction of contracts, that a writing designed to supersede and cancel a former writing cannot have read into it language of the prior cancelled contract to nullify the later, superseding contract. 17 *Corpus Juris Secundum,* p. 715, states the general and local law thus:

> "* * * where there are several contracts in the same matter of different dates or where one is plainly intended to supersede the other, the later will control * * *".

The Circuit Court of Appeals in the instant case has violated this universally accepted and elementary rule of contract construction and has made a new contract for the parties, contrary to the written instrument and contrary to the evidence of record.

Another elementary rule of contract construction which the decision of the Circuit Court of Appeals violates, is stated in 17 *C. J. S.*, p. 735:

> "Where a particular word or words, or the contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid or enforceable, and the other of which will destroy it or render it invalid or ineffective, the former will be adopted so as to uphold the contract, the parties being presumed to have intended to make a binding and enforceable contract."

The illegality and inequity of the decision of the Circuit Court of Appeals is apparent when it is seen that the new contract which the court has made for the parties is one nullifying the contract against petitioner while permitting respondent to retain the fruits thereof.

The violation by the Circuit Court of Appeals of these basic rules of contract interpretations calls for the exercise of this Court's supervision in the interests of the public, as well as justice to petitioner.

The Circuit Court of Appeals had decided important questions of local law in a way in conflict with the applicable local decisions, as follows:

This Court, in *Taylor* v. *Mayo*, 110 U. S. 330, 334, has stated that the trustee of a disclosed trust is liable on his contract and that if he wants to protect himself from individual liability on the contract, he must stipulate that

he is not to be personally responsible but that the other party is to look solely to the trust estate. The Circuit Court of Appeals in the instant case has ignored this decision of this Court on a point of extreme importance not only to the petitioner in this case but also to the public generally dealing with trustees.

The rule of *Taylor* v. *Mayo* is the law of Indiana, as announced in *McClaren, et al.* v. *Dawes,* 86 Ind. App. 196, 156 N. E. 584:

> "Insofar as we are advised, there is no law in this State, statutory or otherwise, authorizing or recognizing the right to organize an association for the purpose of conducting a mercantile business under a declaration of trust and thus evade the statutes concerning the organization of corporations".

The Circuit Court of Appeals has refused to follow this Indiana law although it is controlling in this case.

In *Mt. Pleasant Coal Co.* v. *Watts,* 91 Ind. App. 501, 151 N. E. 7, the factual situation was on all fours with the present case in that plaintiff there entered into a contract with certain individual defendants whereby the defendants agreed to form a corporation, agreed to give plaintiff certain stock thereof if plaintiff would assign to the corporation a lease for certain lands which he held, and agreed that the corporation would employ plaintiff as mine superintendent at eight dollars per day during the remainder of his life. Although the corporation assumed the contract, a question in that case was as to the personal liability on the contract of the individual defendants, and the decision held that they were personally liable. The judgment was affirmed by the Indiana Appellate Court, stating *inter alia* (91 Ind. App. 501, 506, 151 N. E. 7, 9):

"Appellants say that the court erred in overruling each of their separate and several demurrers to the complaint, and argue that the alleged promises of the individual appellants to have the corporation, to be organized in the future, issue to appellee $2000 worth of its capital stock, if ratified by the corporation as alleged, became the promise of the corporation and the individual promisors were released from any and all obligations therein. * * *

"The rule that must control * * * herein is stated in 14 C. J. 269: 'Of course promoters of a corporation are personally liable on contracts which they have entered into personally, even though they have contracted for the benefit of a projected corporation, and although the corporation has been formed and has received the benefits of the contract, and they are not discharged from liability by the subsequent adoption of the contract by the corporation when formed, unless there is a novation or other agreement to such effect."

The Circuit Court of Appeals has ignored this Indiana law, although this Court has said in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78:

"Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the State".

It is a matter of grave importance not only to this petitioner but to the public generally whether the rule of *Erie* v. *Tompkins* may be brushed aside merely by stating that the factual situation is different and without pointing out in what respects it is different, and particularly when as here the factual situation is not materially different. Whether this may properly be done has not been but should be passed upon by this Court.

CONCLUSION.

The procedure followed by the Circuit Court of Appeals in this case deprived petitioner of a fair hearing. The effect of the decision of the Circuit Court of Appeals is to nullify a solemn contract under seal by reading into the contract the language of an expressly cancelled and terminated prior contract; by holding that a trustee of a disclosed trust is not liable on his contract; and by holding that a reference in the contract to a corporation to be formed to carry on the business of the trust relieves the signer of the contract of liability thereon.

Petitioner has no recourse against the corporation and has been unjustly denied recourse on his contract with respondent, without any foundation therefor in law or in equity.

This decision is startling, is subversive of public confidence, and is of vital concern to everyone who has made or may make more than one contract with the same party, and who has dealt or may deal with trustees and promoters.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case is contrary to the applicable rules of law and equity and particularly of the law of the State of Indiana which should have applied, and it is of great importance to the public as well as to petitioner that it be reviewed by this Court, which review petitioner hereby seeks.

Respectfully submitted,

ALLEN J. PATCH,

By A. TREVOR JONES,
LLOYD W. PATCH,
Attorneys for Petitioner.